No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1960

BERNHARD DEUTCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (J.A. 27-31)[1] is reported at 147 F. Supp. 89. The opinion of the court of appeals (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960. The petition for a writ of cer-

[1] "J.A." refers to the Joint Appendix in the court of appeals. "Tr." refers to the transcript of the district court proceedings.

tiorari was . . on July 13, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner raised the question of pertinency at the time he was questioned by the subcommittee.

2. Whether, if pertinency was properly raised, the evidence was sufficient to show that petitioner knew the subject under inquiry by the subcommittee and the pertinency to that inquiry of the questions he refused to answer.

3. Whether the subcommittee's inquiry had a proper legislative purpose.

4. Whether petitioner's rights under the First Amendment were violated.

STATUTE AND RULE INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) and the pertinent portions of Rule XI of the Rules of the House of Representatives are set forth in the petition at pp. 3-4.

STATEMENT

Petitioner was charged in a five-count indictment with having refused to answer five questions asked of him by a subcommittee of the Committee on Un-American Activities of the House of Representatives. Petitioner, having waived trial by jury, was found guilty on four counts (One, Two, Four, and Five) (J.A. 27-31), and was sentenced to serve ninety days and to pay a fine of one hundred dollars (J.A. 33).

The court of appeals, after holding the case in abeyance pending this Court's decision in *Barenblatt* v. *United States*, 360 U.S. 109, affirmed the conviction.

Briefly summarized, the evidence at the trial was as follows:

In February 1953, the House Committee on Un-American Activities began a series of hearings on Communist infiltration into the field of education.[2] From July 13 to 16, 1953, a subcommittee of the full Committee conducted a "general investigation of Communist Party activities" (J.A. 17) in the Albany, New York, area. *Hearings Before the House Committee on Un-American Activities; Investigation of Communist Activities in the Albany, N.Y. Area*, 83d Cong., 1st Sess., Parts 1, 2[3] (Govt. Ex. 1; J.A. 37). The subcommittee then postponed further hearings in Albany (J.A. 13-14), until resuming them on April 7-9, 1954 (*Hearings*, Parts 3-6). During the course of the Albany hearings, the subcommittee heard testimony from witnesses showing that, during the period from 1947 to 1953, a Communist cell was active on the Cornell University campus, located in Ithaca, N. Y., a relatively short distance from Albany, and that students enrolled in the Cornell School of Industrial and Labor Relations were accepting positions

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[2] See "Opening Statement of the Chairman," February 25, 1953," reproduced in full as the Appendix to the court of appeals' opinion in *Barenblatt* v. *United States*, 240 F. 2d 875, 884-885 (C.A. D.C.), reversed, 354 U.S. 930, and quoted in the opinion of this Court, 360 U.S. at 131, note 31.

[3] Hereafter referred to as "*Hearings*."

with Communist-controlled labor unions.[4] As a result, the subcommittee in April 1954 was desirous of "ascertaining to what extent any of those students leaving on those summer courses were influenced to select Communist-controlled unions for the purposes of their summer work" (J.A. 21).

On April 8, 1954, E. Ross Richardson[5] appeared before the subcommittee at Albany and testified in part as follows (J.A. 51-52):

> MR. TAVENNER. Were you aware of the existence of a Communist Party group within the faculty at Cornell?
>
> MR. RICHARDSON. Not as a group. I was only aware of one faculty member who was a Communist Party member, and I did not know who he was.
>
> MR. TAVENNER. You were never successful in learning his name?
>
> MR. RICHARDSON. That's correct.
>
> MR. TAVENNER. How is it that you can testify that there was a person on the faculty who was a member of the Communist Party if you have never learned of his name?

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[4] See, *e.g.*, the testimony of John E. Marqusee (*Hearings*, Part 3, pp. 4333-4353; Govt. Ex. 3) and the testimony of the Committee's counsel at trial relating to information received by the Committee in executive session from Homer Owen (J.A. 21-24).

[5] Richardson, who attended Cornell Law School from 1950 to 1953, was first approached by the Communist Party on the campus. After reporting that fact to the F.B.I., Richardson accepted an invitation to join the Party, and was assigned to the Labor Youth League. He thereafter continued to report to the F.B.I. (*Hearings*, Part 4, pp. 4356-4357).

MR. RICHARDSON. I had one man who was to contact this person, and any information coming from the city committee or from the Communist Party was carried to him through this one person, and anything he had to send back to the Communist Party came back through this one person.

MR. SCHERER. What was that one person's name?

MR. RICHARDSON. Bernie Deutch.

MR. SCHERER. Spell it.

MR. RICHARDSON. D-e-u-t-c-h.

MR. TAVENNER. He was a member of the graduate school group of the party?

MR. RICHARDSON. That's correct.

MR. SCHERER. Again for the record, What year was it that Bernie Deutch acted as a contact man with the professor?

MR. RICHARDSON. I know from the early part of 1952 until the Communist Party re-registration, around March of 1953.

MR. TAVENNER. Were any contributions made to the general work of the party by the unknown individual on the faculty?

MR. RICHARDSON. At one time one hundred and some dollars was turned over to me from a mysterious source, and I suspected it came from that member.

MR. SCHERER. You don't know?

MR. RICHARDSON. I don't know.

MR. SCHERER. You say "a mysterious source." Was it this Bernie Deutch?

MR. RICHARDSON. It came through Bernie Deutch.

MR. SCHERER. Did Bernie Deutch tell you where it was from?

> MR. RICHARDSON. No. He said it came from someone else other than himself.

The petitioner was subpoenaed to appear before the subcommittee in Albany on April 9, 1954, but was granted a continuance at his request. Accompanied by counsel, he appeared in Washington on April 12, 1954 (J.A. 10, 15-16). At the outset of petitioner's testimony, counsel for the Committee made the following introductory statement (J.A. 56):

> Mr. Deutch, during hearings at Albany last week, the committee heard testimony regarding the existence of a Communist Party group or cell operating among undergraduates at Cornell University, among certain graduates at Cornell and in the city of Ithaca.
>
> In connection with that testimony, the committee was informed that you were a member of one or more of those groups. If so, I would like to ask you certain matters relating to your activity there.

Petitioner, in response to questioning, told the subcommittee that he attended Cornell University as an undergraduate and graduate student from 1947 to 1953 (J.A. 55-56); that, during this period, he was a member of the Communist Party (J.A. 56, 61, 65); and that, while in the Party, he worked with Emmanuel Ross Richardson (J.A. 61-63). Petitioner, who indicated familiarity with Richardson's testimony (J.A. 57-58), was told by the subcommittee what Richardson had testified to concerning him (J.A. 56, 58-59).

Petitioner refused to answer a question seeking the name of the faculty member for whom he had acted as liaison with the Party leadership (Count One) solely on the ground that it was against his "moral scruples" to answer questions about other people (J.A. 56). This reason was rejected by the subcommittee as not constituting legal justification, and he was ordered to answer the question (J.A. 56-57). When petitioner again refused to answer, he was informed that under the terms of the statute authorizing its establishment the Committee was charged with investigating the extent of the Communist Party activities including "the existence of the Communist cell" at Cornell (J.A. 58). Petitioner was then asked for the name of the anonymous donor to the Party who had given him the $100 (Count Two), and he responded that he refused to answer the question even though he admitted knowing the donor's name (J.A. 59-60). No reason for the refusal to answer was given. When asked whether he was acquainted with Homer Owen[6] (Count Four), petitioner stated only that "I don't think I should discuss any people from now on * * *" (J.A. 63). In response to a question as to the name of the student who had solicited his membership in the Party

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[6] Homer Owen, a student of industrial relations at Cornell from 1947 or 1948 until 1952, had informed the subcommittee concerning the influencing of students to work with selected Communist-controlled unions for their summer work (J.A. 21-22).

(Count Five), he answered "I don't wish to give his name" (J.A. 65).[7]

ARGUMENT

On May 7, 1958, the Court of Appeals for the District of Columbia Circuit ordered that hearings in this and seven other pending contempt of Congress cases—all of which involved refusals to answer questions asked by congressional committees—"be deferred until after the decision of the Supreme Court in *Barenblatt* v. *United States* * * *." Following the *Barenblatt* decision (360 U.S. 109) on June 8, 1959, the eight cases were assigned to a single panel of the court below, supplemental briefs were ordered filed in each, and oral arguments were heard. On June 18, 1960, the court of appeals reversed the convictions in two[8] of the eight cases, and unanimously affirmed the convictions in the other six,[9] including that of petitioner.

The court of appeals considered petitioner's contentions, and those of the other seven defendants

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[7] It was stipulated at the trial that the Committee reported the petitioner's contumacy to the House of Representatives, and the House certified the Committee's report to the United States Attorney for prosecution (Tr. 26-27).

[8] *Knowles* v. *United States* (No. 13,734); and *Watson* v. *United States*, (No. 13,656). The government is not seeking review in these two cases.

[9] *Deutch* v. *United States* (No. 13,694); *Russell* v. *United States* (No. 13,529); *Price* v. *United States* (No. 13,925); *Liveright* v. *United States* (No. 13,871); *Shelton* v. *United States* (No. 13,737); *Gojack* v. *United States* (No. 13,464). Petitions for certiorari have already been filed in *Russell* (No. 239, this Term) and in *Shelton* (No. 246, this Term). Extensions of time have been obtained in the other cases.

below, in the light of this Court's rulings and opinions in *Watkins* v. *United States*, 354 U.S. 178, and in *Barenblatt, supra*. It is submitted that the decision in *Barenblatt* is dispositive of the issues raised by petitioner, and there is no occasion for further review by this Court.

1. Although conceding that he never "specifically objected to any particular question on the grounds of pertinency in so many words" (Pet. 8), petitioner asserts that his broad, general objection made at the outset of his testimony, coupled with the colloquy during his testimony, really amounted to a "pertinency" objection (Pet. 8-12). In fact, petitioner's contention as to pertinency and unawareness of the subject under inquiry is clearly an afterthought. At the beginning of his testimony, petitioner challenged generally the "jurisdiction" of the Committee under its enabling legislation and the constitutionality of questions concerning his associations (J.A. 56). Thereafter, he answered all the questions asked by the subcommittee except for four questions which he refused to answer solely because it was against his "moral scruples" to answer questions about other persons.[10] Never did he suggest that he did not understand the subject matter under inquiry or how the questions related to this subject. As the court of appeals held: "[Petitioner] based his refusal to answer solely and simply

[10] This is the most favorable characterization which can be made of petitioner's reason for refusing to answer. As to two of the questions he in fact gave no reason for refusing to answer (see the Statement, *supra*, pp. 7-8), unless it is assumed that his reference to "moral scruples" was intended to apply to all subsequent refusals.

on the fact that he did not wish to give the names of other persons. * * * It would require real stretching of the imagination to read into the statement made by Deutch an objection to pertinency * * *" (Pet. 9a-10a).

In *Barenblatt* v. *United States*, *supra*, 360 U.S. at 124, this Court held that the issue of pertinency is not raised by the statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *." *A fortiori*, where, as here, the issue of pertinency was not stated or suggested by the witness at any point in his testimony before the subcommittee, it is even clearer that the witness has failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the questions, and the witness is foreclosed from raising the issue for the first time in the contempt proceeding. *Ibid.*

2. In any event, the district court and the court of appeals found that petitioner was fully aware of the subject of the inquiry and the pertinency of the questions under the standards laid down by this Court in *Watkins* and *Barenblatt*. This two-court finding of fact is fully supported by the record which shows that the nature of the inquiry and the pertinency of the questions to that inquiry were made to appear with "undisputable clarity." *Watkins* v. *United States*, *supra*, 354 U.S. at 214.

Immediately prior to petitioner's testimony before the subcommittee, counsel for the Committee specific-

ally informed him that the subject under inquiry was the existence of Communist groups at Cornell University (see the Statement, *supra*, p. 6).[11] Counsel explained that the Committee wished to question petitioner because it had information that he had participated in at least one of these groups (J.A. 56-58). Petitioner was then asked a series of questions which directly and obviously related to the activity of Communist groups at Cornell: *e.g.*, whether he was a member of the Communist Party while a student at Cornell; whether he was a member of the Party's central committee at Cornell; how many persons attended Party meetings there (J.A. 61-62). Among the questions which directly and obviously related to the subject under inquiry were

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[11] Petitioner complains (Pet. 12-16) of a variance between the "subject under inquiry" as proved at the trial and as urged by the government on appeal, in that at the trial the government proved the "subject" was Communist activities in the Albany area and/or Communism in the field of labor, not Communism in the field of education. This "variance" argument, even if consequential, is completely unsupported by the record. In his opening statement at the trial, the prosecutor pointed out that the subcommittee was interested, not only in Communist infiltration generally, but also "in the field of labor and in the field of education" (Tr. 9). The government introduced the portion of the transcript of the subcommittee hearings containing the statement of committee counsel that the subject under investigation was Communist activity at Cornell (J.A. 56). The trial judge, as finder of fact, found that the "Committee was investigating the infiltration of Communism into educational and labor fields" (J.A. 29; see J.A. 30). And the government's reply memorandum in the court of appeals asserted (p. 5): "The precise topic of the investigation here * * * was Communist activities at Cornell University * * *."

at least three questions which petitioner refused to answer and for which he was convicted for contempt;[12] the name of the faculty member for whom he had acted as liaison with the party leadership; the name of the anonymous donor to the Party; and the student who successfully solicited his Party membership (see the Statement, *supra*, pp. 7-8). The pertinency of these questions to the subject of Communist activity at Cornell was clear beyond doubt, especially to an educated man with both a bachelor's and a master's degree (J.A. 55). Cf. *Barenblatt* v. *United States*, *supra*, 360 U.S. at 124-125.

3. Petitioner also contends (Pet. 16-17) that the names of the individuals whom he refused to identify were not necessary to the Committee's work and would not serve a legislative purpose. But, as was decided in *Barenblatt*, "Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof" (360 U.S. at 127), and such power includes the right to identify a witness as a past or present member of the Communist Party (*id.* at 130). Similarly, the Committee, in investigating Communist activity, also had the power to require the witness to identify other Party members with whom he had actively worked in Party programs. "The nature

[12] The pertinency of the question concerning Homer Owen (Count Four of the indictment) is perhaps less obvious. But if petitioner understood the pertinency of any one of the four questions on which he was convicted, this would be sufficient to sustain his conviction and sentence. *Barenblatt* v. *United States*, *supra*, 360 U.S. at 126, note 25.

and scope of the program and activities [of the Communist Party] depend in large measure upon the character and number of their adherents. Personnel is part of the subject." [13] *Barsky* v. *United States*, 167 F. 2d 241, 246 (C.A. D.C.), certiorari denied, 334 U.S. 843. Petitioner possessed information which might be helpful to the Committee in the performance of its responsibility to investigate Communism, and the questions he refused to answer were plainly relevant to such an investigation.

4. Petitioner last argues (Pet. 18) that the decision of the court below "involves judicial sanction in favor of the investigative power and in derogation of the protection of the First Amendment to a degree which exceeds this court's decision in the *Barenblatt* case." Petitioner, however, failed to rely on the First Amendment in refusing to answer the questions. Near the beginning of his testimony, he stated: "This question, or any similar questions involving my associations, past or future, I am answering, but only under protest as to its constitutionality" (J.A. 56). This general constitutional objection in no way specified or even suggested that petitioner was claiming any rights under the First Amendment. Moreover, petitioner did not make even this general objection as to the questions which he refused to answer.

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[13] Petitioner suggests (Pet. 17) that the Committee may be entitled to the activities of individuals but not their names. The names, however, are highly important in order to measure the scope and extent of Party activity and to call additional witnesses on the subject.

Rather, he merely stated that he had "moral scruples" about informing on others.

In any event, petitioner's First Amendment contention is clearly without merit. The record here is strikingly similar to that in *Barenblatt* in that the Committee had considerable evidence of Communist activity at a major educational institution. The threat of Communist activities and propaganda on the campus and in the schoolroom is a matter of grave and proper public concern. See *Adler* v. *Board of Education*, 342 U.S. 485, 493. And when, as here, Communist activity in the field of education is found to be interrelated with Communist activity in the labor field, the awareness by the Congress of the full extent of such activities becomes all the more important. Thus, as this Court found in *Barenblatt*, 360 U.S. at 134, "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended."

Indeed, the decision in *Barenblatt* goes beyond what is needed to reject petitioner's First Amendment contention. Petitioner saw fit to testify as to his own activities and seeks to invoke the First Amendment only in favor of testimony as to third parties. Under this Court's ruling in *Barenblatt*, it is clear that he could not in these circumstances properly invoke the First Amendment as to his own past and present membership in the Party. *A fortiori*, he cannot invoke the privilege either for the benefit of others or

to support his claim against compulsory disclosure of the names of others.[14]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney Gen al.

KEVIN T. MARONEY,
Attorney.

AUGUST 1960.

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[14] We submit that it is not necessary for the Court to withhold action on this petition until decision of the three other contempt of Congress cases now pending: *McPhaul* v. *United States*, No. 33, this Term, certiorari granted, 362 U.S. 917; *Wilkinson* v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 926; and *Braden* v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960. While this case, like the other three cases, raises the pertinency of the questions to the subject under inquiry, the determination of this issue necessarily depends on the particular factual circumstances involved. Similarly, while contentions concerning violation of the First Amendment and the committee's lack of legislative purpose were raised in *Wilkinson* and *Braden*, these questions also depend on the particular circumstances. Thus, in both the latter cases the petitioners argued that the committee was investigating propaganda activities against itself — allegations which, if true, raise more serious problems as to First Amendment rights and the committee's lack of a legislative purpose than petitioner can claim here. And petitioner himself does not suggest that the same issues are involved here as in the other three cases.

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